



Chapter 8

MANAGING/MONITORING THE CONTRACT

Contract management means any activity related to contracting for personal services, including the decision to contract, contractor screening, contractor selection, contract preparation, contract monitoring, auditing, and post contract follow up. For the purposes of this chapter, however, the particular areas of contract management that occur after contract award will be discussed. The contract manager is generally the individual named in the contract as responsible for its oversight. This can be a program manager, an executive manager, a contract specialist, or any other individual designated by the agency.

8.1 Monitoring Contract Performance

Monitoring means any planned, ongoing, or periodic activity that measures and ensures contractor compliance with the terms, conditions, and requirements of a contract. The level of monitoring should be based on a risk assessment of the contractor's role in delivering the services and the contractor's ability to deliver under the terms of the contract.

8.1.1 Purpose

The purpose of monitoring is to assist the contractor in:

- Complying with the terms and conditions of the contract and applicable laws and regulations.
- Preventing non-compliance by identifying and resolving potential problems by providing constructive, timely feedback.
- Making progress toward the expected results and outcomes.

While the contractor has responsibility to perform under the terms of the contract, the state agency has responsibility for reasonable and necessary monitoring of the contractor's performance. Effective contract monitoring can assist in identifying and reducing fiscal or program risks as early as possible, thus protecting public funds.

Monitoring may be viewed as:

- A preventative function.
- An opportunity to determine the need for technical assistance.
- A valuable source of information concerning the effectiveness of services and service delivery methods.

The contract manager named in the contract provides the principal contract management and monitoring function. This individual is the single contact point for communications between

the agency and the contractor. The chief objective of the contract manager is to ensure that the contractor fulfills all contractual obligations in a quality manner within schedule and within budget. To accomplish this task, the contract manager must be completely knowledgeable of the terms of the contract and maintain requisite controls throughout.

To effectively manage the contract, the contract manager should establish controls and monitor performance to ensure all work is completed within the requirements of the contract. Hours used against the plan and progress toward completion of the deliverables must be monitored. To get good results from a contractor, precise performance objectives must be set. The contractor needs to know exactly what is expected and when it is expected.

Contract management is often initiated by a "start-up" or initial meeting, either on a formal or informal basis, between the contract manager and other agency staff and contractor representatives. From that point, the contract manager can exercise control through a series of progress reports or meetings. Checkpoints may reasonably be set up at least on a weekly basis at the start of the project and, after the first weeks, perhaps on a monthly basis, depending upon contract duration and complexity. Ensuring results and cost control within the project schedule are the chief objectives of contract management.

The contract manager needs to review the contractor's progress reports to determine if the amount of work accomplished and/or hours spent are in line with the contract schedule. Problem areas must be reported and corrective action taken. Progress reports assist the contract manager in gaining control of the project by being able to oversee the work and its progress.

Another aspect of contract management is the control of tasks or deliverables and due dates. The contractor has a right to expect timely responses to requests for information, which, if not provided, may result in unnecessary confusion and project delays. The contract manager is responsible to assure this does not occur. A simple tracking log may be all that is required to maintain a current status of activity and commitments.

By assuming a dynamic role in contract administration, the contract manager is more likely to discover and resolve problems in the early stages of the contract and avoid "crisis management" later. If there is a lack of quality or performance at any milestone point, this needs to be communicated to the contractor without delay and the appropriate changes or corrections made. This lends a posture of competent management throughout the project and provides the leadership required for successful contract completion.

8.1.2 Monitoring Plan

One means of defining the specific monitoring methods appropriate to the particular service and the monitoring activities to be completed for an individual contractor is a monitoring plan. The plan can identify the tools to measure and assess contract performance and compliance, and the process for collecting information. Monitoring plans can also be used to decide which contracts to monitor, based on risk, and can also enable an agency to assess the contract management resources necessary to ensure adequate oversight. The level of

monitoring should be commensurate with the importance or sensitivity of the service. Further, the plan can identify how monitoring activities might be coordinated between multiple state agencies providing funding to a contractor. Ideally, the monitoring plan will be prepared concurrent with the contract to ensure consistency and that contract requirements support the planned monitoring activities.

Not every contract will require the same level of monitoring. Contractors deemed high risk (refer to Section 8.2, Risk Assessment Approach to Contract Management) will require more monitoring than those deemed low risk. Where monitoring results demonstrate consistent satisfactory performance, the frequency and extent of monitoring may be adjusted accordingly. This can save the state money, reduce oversight burdens on the contractor, and recognize the contractor's good performance.

8.1.3 Monitoring Activities

Monitoring activities may include:

- **Periodic contractor reporting:** Require the contractor to submit progress reports or other appropriate data or reports, based on pre-defined criteria, and review the contractor's reports for verification of services provided and adherence to the contract. Substandard performance should be identified and addressed timely and appropriately.
- **Invoice reviews:** Compare billings with the terms agreed upon in the contract. Ensure the costs being charged are within the contract parameters.
- **Other periodic contact with contractor:** On site visits to maintain contact with the contractor to review progress on a regular basis. Good contract monitoring includes a continuous dialogue with the contractor.

Every communication with a contractor is an opportunity to monitor activity. Adequate documentation is essential for effective contract monitoring. Contract files should include copies of letters, meeting notes, and documentation of phone conversations as evidence that conscientious monitoring has occurred during the period of the contract.

Fiscal monitoring includes a review of the contractor's invoices and supporting documentation. Before authorizing payment, contract managers should ensure the contractor has adequately demonstrated the satisfactory delivery of services as agreed to in the contract. Contract managers should verify the accuracy of the contractor's invoices and documentation, whether billings are consistent with contract requirements, and whether total payments are within the limits set by the contract. Contract managers should ensure that payment documentation is on file as required in the State Administrative and Accounting Manual (SAAM), section 85.32.30.

The method of contractor compensation selected may have an impact on the level and type of monitoring activities required to ensure that the state received the services contracted for, and, where specified, the funds are used as intended. Contracts with a cost reimbursement method of compensation, contracts that deliver multiple similar services, or contracts that use multiple funding sources (particularly those supported with federal funds) may require a

higher level of monitoring than contracts using other methods of compensation. It will be necessary to monitor the costs that are reimbursed by the state agency. A higher level of monitoring may involve more testing, such as additional review of contractor reports and documentation, status meetings, or a combination of these methods.

Appropriate fiscal monitoring procedures should be determined as needed. Decisions regarding the scope and methods may take into account requirements established by the funding source, risk assessment results, and other relevant factors. For additional information on fiscal monitoring, consult with agency accounting or auditing staff.

8.2 Risk Assessment Approach to Contract Management

Risk assessment is the process of evaluating exposure to harm or loss that could arise from some activity associated with the personal service contract. It consists of identifying and classifying risks based on certain characteristics, and measuring and evaluating the consequences of these risks.

Contract managers should conduct a risk assessment throughout the contracting process, including when determining the level of monitoring needed, and in targeting efforts to areas of greater risk. The risk-based approach allows contract managers to better focus their oversight efforts on contracts with more monitoring needs. A risk assessment evaluates risk factors in order to determine how much monitoring should be done. Examples of risk factors that may be considered are: the state agency's experience with the contractor, the contractor's systems and controls, and changes in the contractor's operations or personnel.

Risk factors can be broken out into two broad categories: 1) risks associated with the personal services, and 2) risks associated with personal service contractors.

Risks associated with the personal services: Examples of factors that may be considered in assessing risk include:

Funding – Is the amount of funding small or large?

Complexity – Are service requirements simple or complex?

Payment method – What type of payment method is used (e.g., cost reimbursement, fee for service, performance based)? What experience does the state agency have with the method?

Competition – Was the contract awarded on a competitive basis, which includes a detailed evaluation of the proposal, costs, and contractor qualifications?

Risks associated with personal service contractors: Examples of factors that may be considered in assessing risk include:

Funding – Is the amount of funding small or large? Are there multiple funding sources? Does the contractor have many or few contracts with the state?

Length of time in business – Has the contractor been in business for several years or is it a new business?

Experience and past performance – Does the contractor have contracts for similar services with other governmental entities? How extensive is the contractor's experience with the state for this type of service? What is their performance history?

Accreditation/licensure – Is the contractor subject to accreditation or licensure requirements?

Financial health and practices – Is the contractor's financial condition good or poor? Does the contractor demonstrate sound financial practices? Is the contractor's financial record keeping system adequate? Does the contractor do business with related parties and, if yes, does this business affect agency funds?

Board of directors – If the contractor is a nonprofit organization, does the board take an active role in directing the organization, establishing management policies and procedures, and monitoring the organization's financial and programmatic performance? Is the board comprised of individuals who are unrelated? Do employees or ex-employees of the organization serve as board members?

Subcontracting – Does the contractor subcontract key activities? Does the contractor have an effective monitoring function to oversee these subcontracts?

Organizational changes – Has there been frequent turnover of contractor management, senior accounting staff or key program personnel? Has the contractor taken on any new services within the last 12 months? Has the contractor experienced a recent rapid growth or downsizing? Has the contractor experienced reorganization within the last 12 months? Has the contractor changed major subcontractors recently?

Management structure – Is the organization centralized or decentralized? How much control does the organization have over decentralized functions?

Legal actions – Have any lawsuits been filed against the contractor within the last 12 months?

Based on the results of the risk assessment, contract managers may determine the scope, frequency, and methods of monitoring to be used to ensure sufficient oversight, given the risks involved. Risk assessment results may also be used to devise more stringent controls and tighter contract language, when appropriate, to adequately monitor the use of public funds.

It is also important to note that the risk inherent in a contractor's potential performance is dynamic. The risk assessment should be updated periodically to represent current information about the contractor.

8.3 Reviewing Invoices for Payment

Contract payment is the process by which the contractor submits invoices for reimbursement of service and receives payment. The contract manager, who is responsible for evaluating performance of the contract, must carefully audit the contractor's requests for payment to verify the accuracy of all charges. The contract manager should determine if the number of hours or costs are commensurate with the services or deliverables received. The contract manager must also verify that rates for the contractor or subcontractor(s) are as stated in the contract. All documentation submitted must be verified to assure that all charges for the services are justified.

Travel expenses must also be verified to be consistent with contract terms. Most state contracts require reimbursement at current state travel regulation rates. The reasonableness of personal vehicle mileage should be checked if allowable under the contract terms. Other types of expenses charged should be verified to determine if they are allowable under the contract and, if so, whether they are appropriate. Receipts should be attached for travel expenses, if required in the contract terms.

The contract manager must be conscientious to prevent any overpayment to the contractor. Contract overpayment is any payment in excess of the amount agreed upon for work performed or in violation of the terms of the contract. The contract manager must verify receipt of services in accordance with the contract prior to authorizing payment of invoices. If the services received are not acceptable or not in accordance with the contract terms, the contract manager should authorize payment only for those services received that are in accordance with the contract terms and conditions. The contract manager may withhold payment for all other charges until the contract terms and conditions have been met.

If the cost charges are acceptable, the contract manager signs the invoice as "approved for payment" and forwards it to the agency accounting or fiscal office for payment. No payment may be made to a contractor until this invoice process has been followed and an authorizing signature obtained.

8.4 New Contract or Amendment?

In considering a change to an existing contract, the question arises as to whether the change should be implemented through an amendment or a new contract. As a general rule, the answer hinges on whether the amendment would change the nature of the overall work requirement. If the essential character of the work or contract purpose changes, a new contract should be awarded. An essential change occurs when the new tasks are unrelated to the previous tasks, or if the new tasks require significant re-definition of the tasks in the existing contract.

Other circumstances under which a new contract should be considered, rather than amending an existing contract, include:

- A significant change in contract price occurs. This would not be true when an original contract provided for subsequent phases that would logically be added by amendment.

- The changes are not within the scope of work of the original contract. Such changes would have the effect of making the work performed substantially different from the work the parties negotiated at the time the original contract was awarded. In addition, changes within the scope of work but which represent substantial changes in the quantity, duration, cost or nature of the work, are generally not appropriate contract amendments and should be addressed in new procurements.
- Contractor lacks the skill or manpower to undertake the additional scope of work.
- Changes have occurred in the competitive factors since the original procurement.
- The contract extension period is for an inordinate length of time. A guideline would be to issue contracts that fall within the budget cycle of allocated funds in a biennium.

Staff must be able to demonstrate that an amendment is in the best interest of the state. Evidence to satisfy this requirement should, at a minimum, address the following: project continuity, time savings, cost effectiveness and learning curve for a new contractor. By nature, contract amendments allow contractors to obtain additional work without competition. In view of the state's policy of open competition in the award of personal service contracts, agency staff are to carefully examine the nature, extent and cost of the additional service and thoroughly justify the decision to award an amendment, rather than conduct open competition for the service.

8.5 Processing Contract Amendments

As a project progresses, it may be advisable to make changes to the contract in order to enhance and improve the deliverables or service. Any written alteration to an existing contract is called a contract amendment or modification. The principle areas where changes occur and for which amendments are required are:

Scope of Work – This may include adding, modifying or deleting tasks, services or deliverables, or revising specifications. However, changes to the scope of work must be within the general scope of the original contract.

Cost – If the total amount of the contract is increased or decreased, a contract amendment is required.

Period of Performance – An extension to the end date of the contract is the most common change to the period of performance.

Documentation of amendments is extremely important. Execution of an amendment will minimize the misunderstandings, confusion and loss of momentum that can occur in the absence of a timely written record of changes. These types of amendments are considered "bilateral" amendments as they are formal changes to the contract and are signed by both parties. Certain contract amendments are subject to filing with OFM and require a ten working day waiting period before service under the amendment can begin. Allow enough advance time for the filing and approval process in order to minimize project impact.

Minor modifications that do not materially affect the scope of work or cost of the contract, such as address changes or staff changes, do not require a formal amendment, but should be documented in writing by memorandum or letter of agreement. Contract amendments should be discussed with the agency's assistant attorney general whenever clarification is required.

A sample contract amendment format appears on page 8-9.

STATE OF WASHINGTON			

AMENDMENT NO. _____			
TO			
CONTRACT NO. _____			
<p>_____(AGENCY)_____ Contract No. _____ by and between the _____(AGENCY NAME)_____</p> <p>and _____(CONTRACTOR'S NAME)_____ is amended as follows:</p>			
<p>Section __, _____, is hereby revised to _____</p> <p>_____</p> <p>_____</p> <p>_____.</p>			
<p>The effective date of this amendment is _____ or upon execution whichever is later.</p>			
<p>ALL OTHER TERMS AND CONDITIONS OF THIS CONTRACT REMAIN IN FULL FORCE AND EFFECT.</p>			
<p>IN WITNESS WHEREOF, the AGENCY and the CONTRACTOR have signed this contract.</p>			
<p>[CONTRACTOR'S NAME]</p> <p>_____</p>		<p>[AGENCY NAME]</p> <p>_____</p>	
<p>_____</p>		<p>_____</p>	
Title	Date	Title	Date

8.6 Corrective Action

Corrective action means action taken by the contractor that corrects identified deficiencies, produces recommended improvements, or demonstrates that deficiencies or findings are either invalid or do not warrant action.

Corrective action is suggested when identified deficiencies are serious (for example, a failure to complete key deliverables by dates mandated by the Legislature) or where less formal means have failed. Contract problems should be addressed immediately, before they become recurring or serious. Contract managers should check to see if their agency or administrative unit has guidelines or directives for taking corrective action. If so, follow those guidelines or directives.

Serious contract problems that warrant corrective action include:

- Failure to produce or submit key deliverables
- Significant audit or monitoring findings
- Inferior quality of services
- Failure to perform all or part of the contract
- Late performance
- Late submission of reports on a recurring basis

For the staff completing corrective action with contractors, typical responsibilities include:

- Communicating contract remedies, as appropriate, when the contractor's performance is deficient.
- Seeking specialist advice, including legal counsel, when unsure of the rights of either party or the correct action.

To address minor problems or first occurrences of problems, contract managers should:

- Notify the contractor both verbally and in writing that a problem has been identified.
- Notify the contractor of expectations for correcting the problem or, if appropriate, ask the contractor to advise how the problem will be corrected.
- Specify a date or time when you expect the problem to be resolved or action taken.
- Document conversations with the contractor by a memo to the contract file, and/or follow up with a written letter to the contractor.

To address recurring or serious contract problems, contract managers should:

- ✓ Document conversations with the contractor and set time frames for corrective action.
- ✓ Check to see if applicable law or regulations direct how corrective action must occur. If so, comply with the legal requirements.
- ✓ Clearly identify the problem verbally and in writing. Be specific by using dates, number of occurrences, or other data that quantifies the problem. For example, "Paragraph 4 of your Contract states that you must submit a report by the 5th of each month. Your reports for May, June, and July were all submitted over 5 weeks after the due date, and we have not yet received your August report."
- ✓ Advise the contractor in writing about the requirements to correct the problem or, if appropriate, ask the contractor to submit a corrective action plan, including dates when corrective action will be completed. Set a deadline for submission of the plan. If this results in any changes to the contract, amend the contract.
- ✓ Specify a date or time frame for resolution. Unless a shorter or longer time frame is warranted, expect corrective action to be completed within one month.
- ✓ Track all corrective action to ensure completion.
- ✓ If a deadline is missed or corrective action is otherwise not completed, follow up in writing immediately. Notify the contractor that a deadline has been missed and ask the contractor when the action will be completed. Advise the contractor that failure to comply with the corrective action plan could lead to termination of the contract. Note: Failure by contract managers to follow up on corrective action could be interpreted later by the court as a waiver.
- ✓ If the corrective action is successful in resolving problems, notify the contractor in writing that resolution has been achieved. Remember to document this in the contract file.

8.7 Contract Disputes

Contracts should contain a provision for resolution of disputes. A dispute involves a difference of opinion between the agency and contractor about contract terms or expectations.

The standard state contract "dispute" clause provides remedy via an informal dispute process. The disputing party must submit a written statement of the issues to the other party to initiate the dispute process. An agency representative, who has not been involved with the contract, coordinates between the disputing parties to seek satisfactory resolution. Each party is allowed to submit information in support of its position and to review and comment on the submission of the other party. A written decision is then provided to both parties. The informal dispute process is to precede any court action.

8.8 Contract Termination

Contracts may be terminated prior to the completion date of the contract either for convenience of the parties or for cause as provided under the contract terms.

8.8.1 Termination for Convenience

The termination for convenience clause is intended to handle changed conditions under the contract, particularly when the expectations of the parties have been subjected to substantial change.

The Attorney General's Office should always be contacted when an agency is considering a termination for convenience.

8.8.2 Termination for Default

To terminate a contract based upon the other party's default, the party asserting default must demonstrate that there has been a material breach in one or more of the terms or conditions of the contract. By invoking the termination for default clause, the agency is generally in a position to claim damages due to the other party's breach of the contract. Writing clear and specific contract language will help avoid this type of action. Again, the agency's assistant attorney general should always be consulted whenever an agency is considering invoking this clause.

If the contractor does not perform early in the contract period and the contract is terminated, the question may arise as to whether the project must be re-bid. Generally, the answer would be "yes". However, if the project is only a few months along, it may be advisable to offer the project to the second highest scoring bidder. A guideline is whether enough time has passed to alter the relative position of the bidders from the original procurement and whether the original bids have expired. Even when the bids have expired, a bidder may be contacted to determine whether they would be interested in a contract at the same terms as in their original bid. It is always advisable to check with the Attorney General's Office prior to proceeding with negotiations with another bidder.

8.9 Remedies and Sanctions

Remedy and sanction contract language permits the imposition of penalties or other terms against a party for noncompliance with the contract. The purpose of remedy and sanction provisions in a contract is to ensure all parties to the contract comply with the contract terms. Also, these provisions allow options to correct, sanction, or terminate a contractor who fails to adequately perform under the terms and conditions of the contract.

Considerations for remedy and sanction provisions:

- What mechanisms are in place to ensure contract compliance and performance?
- Do federal or state requirements exist that must be enforced?
- Which provisions will most likely encourage contract compliance and performance?
- Are alternative service contractors available?
- What are the implications of service disruption to clients?

Remedy and sanction provisions may include:

- Implementation of a corrective action plan after auditing or monitoring.
- Financial incentives or penalties, including the right to withhold payment.
- Federal debarment or suspension of the right to contract with an agency or agencies.
- Preservation, protection, and return of information and property.
- Dispute resolution procedures.
- Summary suspension of the contract.
- Termination of the contract.

8.10 Audit

Auditing is defined as a systematic process of objectively obtaining and evaluating documentation to ascertain the fairness of management's representation of financial statements, internal controls, and compliance with applicable laws and regulations.

Audits may be required by law, as is the case for federally funded contracts (refer to OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations at www.whitehouse.gov/OMB/circulars). When writing contracts, agencies should consider whether an A-133 audit is required and whether that meets the audit needs. If not, the agency may require an audit beyond those required by law. When an audit is not required by law, state agencies should use a risk-assessment process to consider whether an audit of the contractor is needed. When an audit is deemed appropriate and necessary, the expectations for the audit scope, methodology and due date should be included in the written contract.

An audit can be designed to accomplish one or more of the following:

- Provide reasonable assurance as to the financial information reported by or obtained from the contractor.
- Assess the financial condition of a contractor.
- Assess the internal control system of a contractor.
- Assess the performance of a contractor.
- Assess compliance with applicable laws and contract regulations.

While an audit can be an effective monitoring tool, it carries a cost. Therefore, it is incumbent that care be exercised in calling for audits.

8.10.1 Handling Questioned Costs

Questioned costs are normally those costs associated with an audit finding. These costs can be handled in several ways.

First, a decision on whether or not to pursue recovery of the questioned costs should be made. There may be good reasons not to pursue recovery of the questioned costs. While this is an option, compelling reasons and authority, generally based on Assistant Attorney General guidance, are required to exercise this option.

Options for recovering questioned costs may include:

- Billing the contractor
- Adjusting future payments until the questioned costs have been recovered
- Deducting the questioned costs from the final payment

Contracts dealing with federal funds may require different processes. Also, it is important to note that when recovering questioned costs, the repayment by the contractor is generally not an allowable cost for current contracts.

8.11 Suspected Criminal Activity

Some activities, such as over billing by the contractor, may be either genuine errors by the contractor or, in extreme cases, could be the result of criminal activity. Generally, the contract manager should consider the contractor's explanations, while remaining sensitive to the possibility of fraud or related criminal activity. Although rare, the contract manager is often the first person with the opportunity to identify suspicious activity and should follow the agency's process for investigating when criminal activity is suspected.

State agency staff that conduct investigations must participate in Investigator Training offered by the Department of Personnel as required by Executive Order 98-02.

8.12 Review and Implement Contractor's Final Product

Once the contract has ended, contract managers are responsible for:

- Following up on any activities that the contractor is completing (i.e., final report).
- Ensuring all invoices are received and paid, and making final payments to the contractor.
- Assessing whether objectives and outcomes have been met.

When contract work is completed, the contractor may be required to submit a final report. Not all contracts will require such a report, but when they do, the final written product should address, at a minimum, the following areas as appropriate to the type of consulting service provided:

- Statement of the problem investigated or need addressed.
- Description of the methodology used.
- Alternative solutions or approaches available.
- Selected solution or approach and reasons for selection.
- Benefits or results to be realized.
- Recommendations for further improvements.
- Other matters which should receive management emphasis or attention.

Once results have been accepted, an agency is responsible for correcting identified problems and implementing the recommendations. Follow-through by agency management on work done by the contractor is critical to the success of the overall project. The final report should be thoroughly reviewed with the contractor to ensure that all conclusions, supporting logic and related information are understood by the agency.

When the contractor's final report is accepted by an agency, the contract manager should develop a work plan detailing the steps necessary to implement the recommendations.

The work plan should take into consideration the following factors:

- Which recommendations are to be implemented?
- What agency resources are required to proceed with implementation?
- Is staff sufficiently trained or prepared to proceed with any changes required?
- What tasks are required to implement each recommendation?
- Whose responsibility is it to complete each task?
- How and when will implementation be accomplished?

8.13 Evaluate Contractor's Performance

Once a contract is completed, the agency contract manager may want to prepare a contractor evaluation. This evaluation will be useful if agency management wants an analysis of consultant performance and if other agencies inquire about the consultant. The evaluation may address the following:

- Achievement of project goals and objectives.
- Timely completion of work.
- Quality of work measured against project objectives.
- Quantity of work.
- Professional manner and conduct.
- Working relationship with agency staff.
- Quality of project management.

Contract managers should share information gained from administering the contract so that those responsible for future contracts can gain from these experiences.

